

S. 1482

IN THE SENATE OF THE UNITED STATES

Mr. BIDEN (for himself, Mr. BAYH, Mr. HUDDLESTON, and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

To provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the “Classified Information
4 Procedures Act”.

6 SECTION 1. (a) “Classified information”, as used in this
7 Act, means any information or material that has been deter-
8 mined by the United States Government pursuant to an Ex-
9 ecutive order, statute, or regulation, to require protection

1 against unauthorized disclosure for reasons of national secu-
2 rity and any restricted data, as defined in section 2014(y) of
3 title 42, United States Code.

4 (b) "National security", as used in this Act, means the
5 national defense and foreign relations of the United States.

6 PRETRIAL CONFERENCE

7 SEC. 2. At any time after the filing of the indictment or
8 information, any party may move for a pretrial conference to
9 consider matters relating to classified information that may
10 arise in connection with the prosecution. Following such
11 motion, or on its own motion, the court shall promptly hold a
12 pretrial conference to establish the timing of requests for dis-
13 covery, the provision of notice required by section 5 of this
14 Act, and the initiation of the procedure established by section
15 6 of this Act. In addition, at the pretrial conference the court
16 may consider any other matters which relate to classified in-
17 formation or which may promote a fair and expeditious trial.

18 PROTECTIVE ORDERS

19 SEC. 3. Upon request of the Government, the court
20 shall issue a protective order to guard against the compro-
21 mise of any classified material disclosed to the defendant.

22 DISCLOSURE OF CLASSIFIED INFORMATION TO

23 DEFENDANTS

24 SEC. 4. The court may authorize the Government to
25 delete specified items of classified information from docu-

1 ments to be made available to the defendant, to substitute a
2 summary of the information for such classified documents, or
3 to substitute a statement admitting relevant facts that the
4 classified information would tend to prove. The Govern-
5 ment's motion requesting such authorization and materials
6 submitted in support thereof shall, upon request of the Gov-
7 ernment, be considered by the court in camera and not dis-
8 closed to the defendant.

9 NOTICE OF DEFENDANT'S INTENTION TO DISCLOSE

10 CLASSIFIED INFORMATION

11 SEC. 5. (a) NOTICE BY DEFENDANT.—If a defendant
12 reasonably expects to disclose or to cause the disclosure of
13 classified information in any manner in connection with any
14 trial or pretrial proceeding involving the criminal prosecution
15 of such defendant, the defendant shall, within the time speci-
16 fied by the court or where no time is specified within thirty
17 days prior to trial, notify the attorney for the Government
18 and the court in writing. Whenever a defendant learns of
19 additional classified information he reasonably expects to dis-
20 close at any such proceeding, he shall notify the attorney for
21 the Government and the court in writing as soon as possible
22 thereafter. Such notice shall include a brief description of the
23 classified information. No defendant shall disclose any infor-
24 mation known or believed to be classified in connection with
25 a trial or pretrial proceeding until notice has been given

1 under this subsection and until the Government has been af-
2 forded a reasonable opportunity to seek a determination pur-
3 suant to the procedure set forth in section 6 of this Act.

4 (b) FAILURE TO COMPLY.—If the defendant fails to
5 comply with the requirements of subsection (a) the court may
6 preclude disclosure of any classified information not made the
7 subject of notification and may prohibit the examination by
8 the defendant of any witness with respect to any such infor-
9 mation.

10 PRECEDURE FOR CASES INVOLVING CLASSIFIED
11 INFORMATION

12 SEC. 6. (a) MOTION FOR HEARING.—After the United
13 States receives notification pursuant to section 5 or otherwise
14 learns of any classified information that the defendant may
15 disclose or cause to be disclosed at a trial or pretrial proceed-
16 ing, the Government may, within the time specified by the
17 court, move for a hearing concerning any such information.
18 In connection with its motion, the Government may submit
19 the classified information along with an explanation of the
20 basis for the classification to the court for its examination in
21 camera and shall provide the court with an affidavit of the
22 Attorney General, the Deputy Attorney General, or a desig-
23 nated Assistant Attorney General certifying that the informa-
24 tion is classified. The hearing, or specified portion thereof,
25 shall be held in camera whenever the Government certifies

1 that a public proceeding may result in the compromise of
2 classified information.

3 (b) HEARING.—(1) Prior to the hearing, the Govern-
4 ment shall provide the defendant with notice of the informa-
5 tion that will be at issue. This notice shall identify the
6 specific classified information that will be at issue whenever
7 that information has previously been made available to the
8 defendant in connection with the pretrial proceedings. The
9 Government may describe the information by generic catego-
10 ry rather than identifying the specific information of concern
11 to the Government when the Government has not previously
12 made the information available to the defendant in connection
13 with the pretrial proceedings.

14 (2) Where the Government moves for a hearing prior to
15 trial, the Government shall upon request of the defendant
16 provide the defendant with a bill of particulars as to the por-
17 tions of the indictment or information which the defendant
18 identifies as related to the classified information at issue in
19 the hearing. The bill of particulars shall be provided prior to
20 the hearing.

21 (3) Following a hearing, the court shall determine
22 whether and the manner in which the information at issue
23 may be used in a trial or pretrial proceeding. As to each item
24 of classified information, the court shall set forth in writing
25 the basis for its determination. Where the Government's

1 motion under subsection (a) is filed prior to the trial or pre-
2 trial proceeding, the court shall rule prior to the commence-
3 ment of the relevant proceeding.

4 (4)(A) If the court determines that the information may
5 not be disclosed or elicited at a pretrial or trial proceeding
6 the record of the hearing shall be sealed and preserved by the
7 Government in the event of an appeal. The defendant may
8 seek reconsideration of the court's determination prior to or
9 during trial.

10 (B) In lieu of authorizing disclosure of the specific clas-
11 sified information, the court shall, if it finds that the defend-
12 ant's right to a fair trial will not be prejudiced, order—

13 (i) substitution of a statement admitting relevant
14 facts that the specific classified information would tend
15 to prove, or

16 (ii) substitution of a summary or portion of a spe-
17 cific classified information.

18 (C) If the court determines that these alternatives to full
19 disclosure may not be used and the Government provides the
20 court with an affidavit of the Attorney General, Deputy At-
21 torney General, or designated Assistant Attorney General
22 objecting to disclosure of the information, the court shall
23 issue any order which is required in the interest of justice.
24 Such an order may include, but need not be limited to an
25 order—

1 (i) striking or precluding all or part of the testi-
2 mony of a witness; or

3 (ii) declaring a mistrial; or

4 (iii) finding against the Government on any issue
5 as to which the evidence relates; or

6 (iv) dismissing the action, with or without preju-
7 dice; or

8 (v) dismissing specified counts of the indictment
9 against the defendant.

10 Any such order shall permit the Government to avoid the
11 sanction for nondisclosure by agreeing to permit the defend-
12 ant to disclose the information at the pertinent trial or pre-
13 trial proceeding. The Government may exercise its right to
14 take an interlocutory appeal prior to determining whether to
15 permit disclosure of any classified information.

16 (c) RECIPROCITY.—Whenever the court determines
17 pursuant to subsection (b) that classified information may be
18 disclosed in connection with a trial or pretrial proceeding, the
19 court shall, unless the interest of fairness do not so require,
20 order the Government to provide the defendant with the in-
21 formation it expects to use to rebut the classified information.
22 The court may place the Government under a continuing
23 duty to disclose such rebuttal information. If the Government
24 fails to comply with its obligation under this subsection, the
25 court may exclude any evidence not made the subject of a

1 required disclosure and may prohibit the examination by the
2 Government of any witness with respect to such information.

3 INTERLOCUTORY APPEAL

4 SEC. 7. (a) An interlocutory appeal by the United States
5 taken before or after the defendant has been placed in jeop-
6 ardy shall lie to a court of appeals from a decision or order of
7 a district court in a criminal case requiring the disclosure of
8 classified information, imposing sanctions for nondisclosure of
9 classified information, or refusing a protective order sought
10 by the United States to prevent the disclosure of classified
11 information, if the Attorney General, Deputy Attorney Gen-
12 eral, or designated Assistant Attorney General certifies to
13 the district court that the appeal is not taken for purposes of
14 delay.

15 (b) An appeal taken pursuant to this section either
16 before or during trial shall be expedited by the court of ap-
17 peals. Prior to trial, an appeal shall be taken within ten days
18 after the decision or order appealed from and the trial shall
19 not commence until the appeal is resolved. If an appeal is
20 taken during trial, the trial court shall adjourn the trial until
21 the appeal is resolved and the court of appeals (i) shall hear
22 argument on such appeal within four days of the adjournment
23 of the trial, (ii) may dispense with written briefs other than
24 the supporting materials previously submitted to the trial
25 court, (iii) shall render its decision within four days of argu-

1 ment on appeal, and (iv) may dispense with the issuance of a
2 written opinion in rendering its decision. Such appeal and
3 decision shall not affect the right of the defendant, in a subse-
4 quent appeal from a judgment of conviction, to claim as error
5 reversal by the trial court on remand of a ruling appealed
6 from during trial.

7 INTRODUCTION OF CLASSIFIED INFORMATION

8 SEC. 8. (a) CLASSIFICATION STATUS.—Writings, re-
9 cordings, and photographs containing classified information
10 may be admitted into evidence without change in their classi-
11 fication status.

12 (b) PRECAUTIONS BY COURT.—The court, in order to
13 prevent unnecessary disclosure of classified information in-
14 volved in any criminal proceeding, may order admission into
15 evidence of only part of a writing, recording, or photograph,
16 or may order admission into evidence of the whole writing,
17 recording, or photograph with excision of some or all of the
18 classified information contained therein.

19 (c) TAKING OF TESTIMONY.—During the examination
20 of a witness in any criminal proceeding, the Government may
21 object to any question or line of inquiry that may require the
22 witness to disclose classified information not previously found
23 to be admissible. Following such an objection, the court shall
24 take such suitable action to determine whether the response
25 is admissible as will safeguard against the compromise of any

1 classified information. Such action may include requiring the
2 Government to provide the court with a proffer of the wit-
3 ness' response to the question or line of inquiry and requiring
4 the defendant to provide the court with a proffer of the
5 nature of the information he seeks to elicit.

6 SECURITY PROCEDURES TO SAFEGUARD AGAINST COM-
7 PROMISE OF CLASSIFIED INFORMATION DISCLOSED
8 TO THE COURT

9 SEC. 9. (a) Within one hundred and twenty days follow-
10 ing the date of enactment of this Act, the Chief Justice of the
11 United States, in consultation with the Attorney General, the
12 Director of Central Intelligence, and the Secretary of De-
13 fense, shall prescribe security procedures for protection
14 against the compromise of classified information submitted to
15 the Federal district courts, the courts of appeals, and the
16 Supreme Court.

17 (b) Until such time as procedures are promulgated pur-
18 suant to subsection (a), the Federal courts shall in each case
19 involving classified information adopt procedures to protect
20 against the compromise of such information.

21 JENCKS ACT EXCEPTION FOR CLASSIFIED INFORMATION

22 SEC. 10. (a) Chapter 223 of title 18, United States
23 Code, is amended by adding after subsection 3500(c) the fol-
24 lowing new subsection:

1 “(d) If the United States claims that any statement oth-
2 erwise producible under this section contains classified infor-
3 mation, the United States may deliver such statement for the
4 inspection of the court in camera and provide the court with
5 an affidavit from the Attorney General, Deputy Attorney
6 General, or designated Assistant Attorney General identify-
7 ing the portions of the statement that are classified. If the
8 court finds that any such portion of the statement is consist-
9 ent with the witness’ testimony, the court may substitute a
10 summary for the classified portion or excise the portion from
11 the statement. With such material replaced by a substitution
12 or excised, the court shall then direct delivery of such state-
13 ment to the defendant for his use. If, pursuant to such proce-
14 dure, any portion of such statement is withheld from the de-
15 fendant and the defendant objects to such withholding, and
16 the trial is continued to an adjudication of the guilt of the
17 defendant, the entire text of such statement as well as the
18 affidavit submitted by the United States shall be preserved by
19 the United States and, in the event the defendant appeals,
20 shall be made available to the court of appeals for its exami-
21 nation for the purpose of determining the correctness of the
22 ruling of the trial judge. Whenever any statement is delivered
23 to a defendant pursuant to this section, the court in its discre-
24 tion, upon application of said defendant, may recess proceed-
25 ings in the trial for such time as it may determine to be

1 reasonably required for the examination of such statement by
2 said defendant and his preparation for its use in the trial.”.

3 (b) Chapter 223 of title 18, United States Code, is
4 amended as follows:

5 (1) Present subsections 3500(d) and 3500(e) shall
6 be redesignated subsections 3500(e) and 3500(f), re-
7 spectively.

8 (2) In new subsection 3500(e), following the word
9 “under” replace “subsection (b) or (c)” with “subsec-
10 tion (b), (c), or (d).”.

11 (3) In new subsection 3500(f), following the words
12 “used in” replace “subsection (b), (c), and (d)” with
13 “subsection (b), (c), (d), and (e).”.

14 IDENTIFICATION OF INFORMATION RELATED TO THE
15 NATIONAL DEFENSE

16 SEC. 11. In any prosecution in which the Government
17 must establish that material relates to the national defense or
18 constitutes classified information, the Government shall
19 notify the defendant, within the time specified by the court, of
20 the portions of the material that it reasonably expects to rely
21 upon to establish the national defense or classified informa-
22 tion element of the offense.

23 ATTORNEY GENERAL GUIDELINES

24 SEC. 12. (a) Within one hundred and eighty days of en-
25 actment of this law, the Attorney General shall issue guide-

1 lines specifying the factors to be used by the Department of
2 Justice in rendering a decision whether to prosecute a viola-
3 tion of Federal law in which, in the judgment of the Attorney
4 General, there is a possibility that classified information will
5 be revealed. Such guidelines shall be transmitted to the ap-
6 propriate committees of Congress.

7 (b) When the Department of Justice decides not to pros-
8 ecute a violation of Federal law pursuant to subsection (a), an
9 appropriate official of the Department of Justice shall pre-
10 pare written findings detailing the reasons for the decision
11 not to prosecute. The findings shall include—

12 (1) the intelligence information which the Depart-
13 ment of Justice officials believe might be disclosed,

14 (2) the purpose for which the information might
15 be disclosed,

16 (3) the probability that the information would be
17 disclosed, and

18 (4) the possible consequences such disclosure
19 would have on the national security.

20 (c) Consistent with applicable authorities and duties, in-
21 cluding those conferred by the Constitution upon the execu-
22 tive and legislative branches, the Attorney General shall
23 make available to the Permanent Select Committee on Intel-
24 ligence of the United States House of Representatives and
25 the Select Committee on Intelligence of the United States

14

- 1 Senate all findings under subsection (b) not later than thirty
- 2 days after the decision not to prosecute is made.

○